

A photograph of the Singapore skyline at dusk, featuring the Marina Bay Sands hotel with its iconic skybridge, the Esplanade - Theatres on the Bay, and the Gardens by the Bay. The buildings are reflected in the water in the foreground. The sky is a mix of blue and orange.

# Sanctions and Choice of Law: some case studies

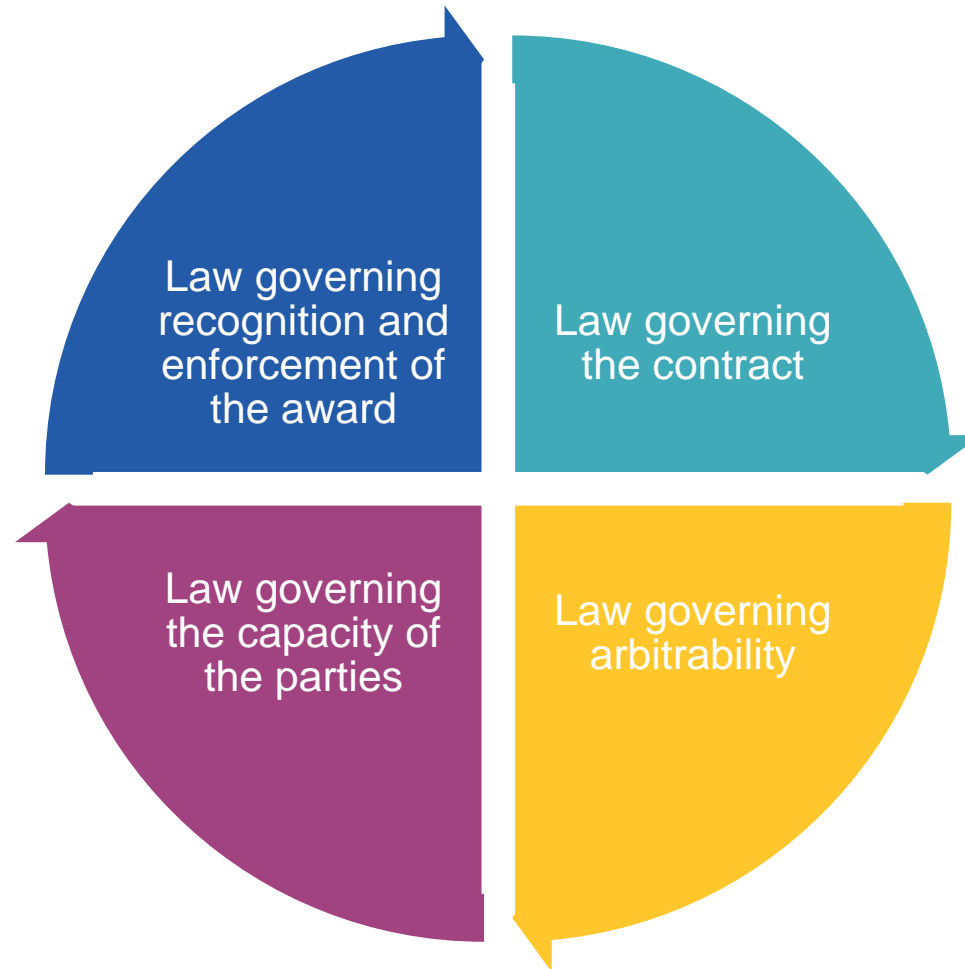
4 November 2022 (Friday)

Tomas Furlong, Partner



# Summary

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# Law governing the contract





## Choice of law: the law of the contract and the place of performance

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Foreign sanctions may excuse the parties from performing the contract if:

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(a) it has become illegal to perform under the law of the contract; or

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(b) it necessarily involves doing an act which is unlawful by the law of the place where the act has to be done.

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### *Libyan Arab Bank v Bankers Trust Co* [1989] 1 QB 728

The United States Government issued regulations prohibiting United States banks (including their foreign branches) from repaying Libyan deposits.

The High Court found that Libyan Arab Bank could sue for the return of the deposits with the London branch of the New York bank. The contract of deposit was governed by English law and England was the place of performance of the agreement between the parties.





# Impact of foreign sanctions for Singapore law contracts

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## Local public policy

Contracts which are entered into with object of committing illegal acts may be unenforceable, subject to the principle of proportionality.

If one or both parties intend to perform a contract in an unlawful way, contrary to foreign sanctions legislation, the courts may refuse to enforce the contract as a matter of local public policy.

*(Royal Boskalis Westminster NV v Mountain [1999] QB 674)*

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## Contractual reference to foreign sanctions

There was no default of a Facility Agreement that stated that the borrower should not be in default if *“such sums were not paid in order to comply with any mandatory provision of law, regulation or order of any court of competent jurisdiction”*

*(Lamesa Investments Limited v Cynergy Bank Limited [2020] EWCA Civ 821)*

## Force majeure

Foreign sanctions may be force majeure events, depending on the terms of the force majeure clause.

Where there is a clause that that the force majeure event or state of affairs *“cannot be overcome by reasonable endeavours from the Party affected”*, this may require the parties to accept alternative modes of performance not stipulated in the contract.

*(MUR Shipping BV v RTI Ltd [2022] EWCA Civ 1406)*



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## Law governing arbitrability



# Law governing arbitrability

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**In Singapore-seated arbitrations, arbitrability is governed by Singapore law**

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**The question is whether it is contrary to Singapore public policy for the subject matter of the dispute to be resolved by arbitration**

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**The High Court held that Indian minority oppression claims were arbitrable in a Singapore-seated arbitration even though they were non-arbitrable under Indian law**

*(Westbridge Ventures II Investment Holdings v Anupam Mittal [2021] SGHC 244)*







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## Law governing capacity







# Law governing the capacity of the parties

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- Under Article V(1)(a) of the New York Convention, recognition and enforcement of an arbitral award may be refused if the parties to the arbitration agreement were **“under the law applicable to them, under some incapacity”**
- Includes legal capacity *stricto sensu* and the lack of authority to enter into the arbitration agreement
- Legal capacity
  - Individuals – law of the person's nationality in civil law jurisdictions, law of the person's domicile or habitual residence in common law jurisdictions
  - Business – law of the place of incorporation or law of the business
- Lack of authority
  - Could be personal law of the parties – e.g. company law where act is carried out by company's organs
  - Could be the law of the state where any power of attorney was exercised if the arbitration agreement was executed based on a power of attorney



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Law governing recognition and enforcement of the award





## Law governing recognition and enforcement of the award



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### Article V(2) of the New York Convention:

Recognition and enforcement of an arbitral award may be refused if

“(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.”

### Public policy

Safety valve in exceptional circumstances where it would violate the forum state's most basic/fundamental notions of morality and justice

Most jurisdictions recognise that a mere violation of domestic law is unlikely to be sufficient

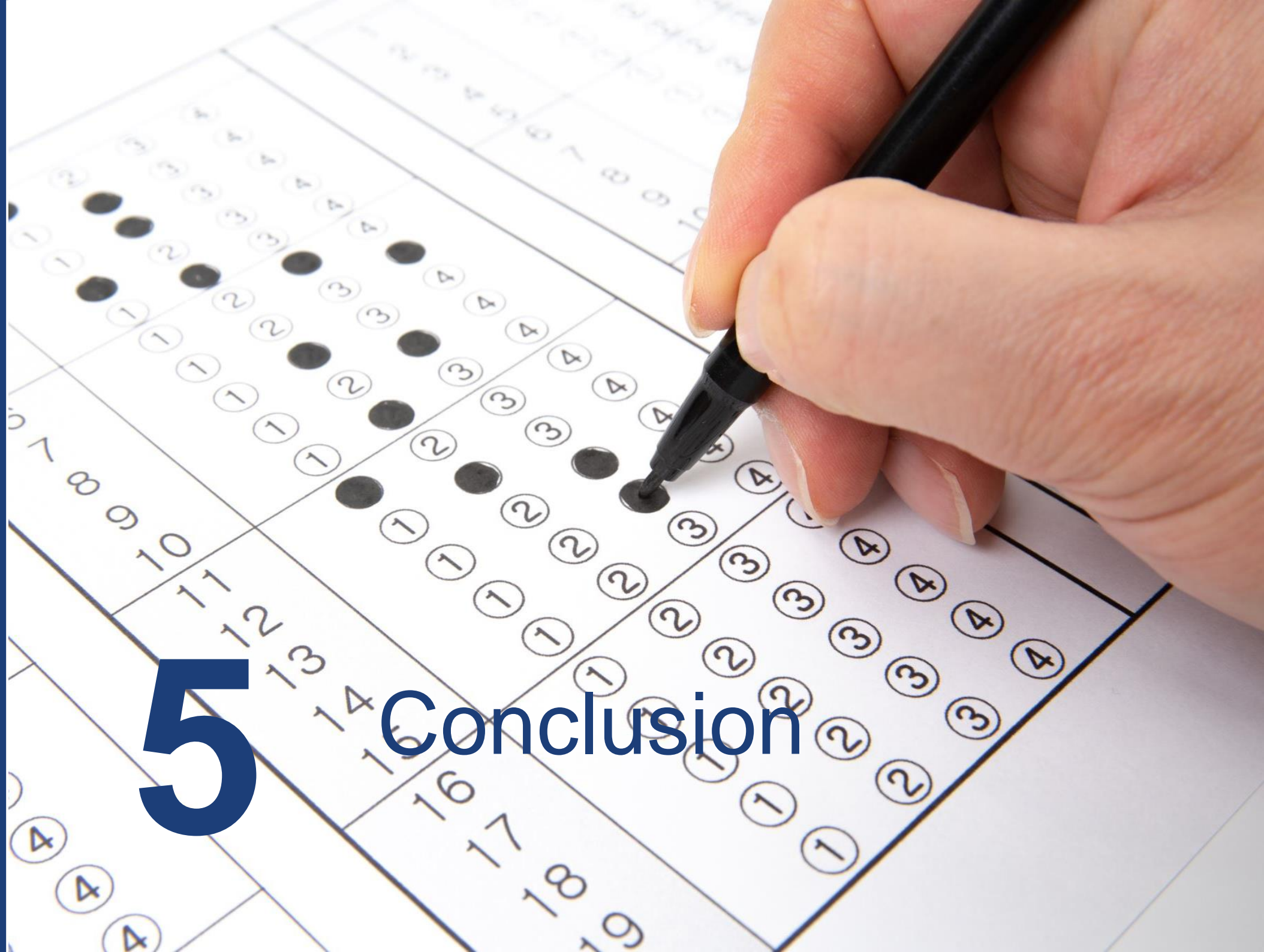
### Arbitrability

Part of a wide range of tools such as the mandatory rules of the forum, which override party autonomy and enable a national court to protect the core interests of the legal order to which it belongs

E.g. bankruptcy, insolvency proceedings



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Conclusion



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